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IN THE

Supreme Court of the United States

October Term, 1961.

No. 344.

RADIO CORPORATION OF AMERICA,

Petitioner,

v.

ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL; ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL CAMDEN AREA CHAPTER; and CHARLES M. BRINDLEY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief for Respondent in Opposition.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey (R. 150a-176a) [1] is unreported. The opinion of the Court of Appeals (App., *infra*, pp. 1a-10a) is reported at 291 F. 2d 105.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

1. Record references herein are to the Joint Appendix in the court below.

QUESTION PRESENTED.

Whether, under the decisions of this Court, a company may refuse to arbitrate a grievance which by its terms involves a dispute between the parties as to the interpretation or application of a provision of the labor agreement where the language of the labor agreement itself specifically provides that grievances are defined as disputes or differences with respect to the interpretation or application of any provision of the agreement.

COUNTER-STATEMENT.[2]

The litigation here relates to the right of the Association of Professional Engineering Personnel to require that a particular grievance be arbitrated. The Action was originally instituted by the Radio Corporation of America (hereinafter referred to as "RCA") under Section 301 of the Labor Management Relations Act of 1947,[3] as amended, and the Declaratory Judgment Act of June 25, 1948,[4] as amended.

The Plaintiff RCA, is a corporation, organized under the laws of the State of Delaware, having a principal place of business in Camden, New Jersey. The Defendants, Association of Professional Engineering Personnel and Association of Professional Engineering Personnel Camden Area Chapter, are, for the purposes of this appeal, identical (and are referred to hereinafter as "Association") The Defendant, Charles M. Erindley, was the President of the Association at the time this action was instituted and, otherwise, his inclusion as a Defendant is of no significance in this matter. The Association is an unincorporated labor organization, having offices in Camden, New Jersey and representing a collective bargaining unit made up of engineering person-

2. The Counter-Statement is substantially the same as the statement of facts set forth in the Brief filed on behalf of the Association of Professional Engineering Personnel in the Court of Appeals.

3. Act of June 23, 1947, Title 29 U. S. C. § 185.

4. 68 Stat. 890, Title 28 U. S. C. §§ 2201 and 2202.

nel employed by RCA at its Camden, Cherry Hill and Moorestown, New Jersey plants.

The Association and RCA entered into a written collective bargaining agreement (hereinafter referred to as "Contract"), effective December 14, 1956, to continue to July 1, 1958, covering the terms and conditions of employment for the employees represented by them. The Contract was attached to the Plaintiff's Complaint as Exhibit "A" and its pertinent provisions are reprinted in the joint appendix, pages 137a through 149a.

The dispute which is the basis for this litigation arises under paragraph 5.07 of the Contract (Joint App. 141a-142a) This paragraph provided for the procedure whereby employees of RCA who are members of the Association are reviewed for the purpose of arriving at merit increases.

Article 8 of the Contract contains a detailed procedure for processing all grievances (Joint App. 142a-147a). The term "grievances" is defined under Article 1 of the Contract as meaning ". . . disputes or differences between the Company and the Association, or employees represented by it, with respect to the interpretation or application of any provision" of the Contract (Joint App. 137a).

In early 1958 the defendant Association was approached by certain of its members with complaints that they had received merit increases substantially lower than those received on prior occasions. Investigation of these complaints by the Association led to the conclusion that the reduced increases bore no relationship to the employees' level of performance. In view of this conclusion, a number of grievances were filed in February and March of 1958, each one pertaining to the failure of the Company to abide by the Labor Agreement and the practices established by the parties. At the meetings called to discuss these grievances, however, the Company refused to present any justification for the reduced merit increases, and instead took the adamant position that the issue submitted was not grievable. One by one, therefore, the grievances were denied.

As a consequence of these events the Association became aware that a great number of its members were receiv-

ing reduced merit increases. This being so, it became incumbent upon the Association to take whatever steps as might be necessary to protect the interests of its members.

The Association made a detailed analysis of the information it had on hand, some of it having come from the Company, and some from its members. The result of that analysis was a conclusion that the company had embarked upon a positive program of reducing the general level of merit increases granted. This was not evidenced by isolated instances of reduced increases, but by an obvious, across-the-board pattern of reductions, and, as far as could be determined, this program had its inception in or about September, 1957.

Faced with this realization, the Association filed a grievance with the Company on April 17, 1958. The written grievance, as amended at the grievance meeting, stated:

> "The Association grieves for the following reasons: Under the Agreement, the Company is obligated to review, periodically, the performance of employees for the purpose of determining whether the particular employee is entitled to a merit increase. Under the Agreement and by established practice, the Company has become obligated to grant a level of increase which, for the group as a whole, is consistent with the level granted in prior years *and has also become obligated to base the level of increase for any individual employee upon his level of performance.* The Company has now violated the Agreement and these established practices by reducing the general level of merit increases and *by basing individual increases upon factors other than the level of performance.* The Company is requested to review the merit increase records for all employees starting with September, 1957, and to revise their decisions as to individual merit increases so as to bring the average level of merit increases granted up to the average existing prior to that date." (Emphasis added.) (Joint App. 36a-37a)

The Company's answer to the grievance was as follows:

> "The Company contends that the amount of a merit increase is not arbitrable under the Master Agreement. Even if this were a proper subject for arbitration, the Association's grievance is untimely in that the written grievance was presented more than 40 days after the occurrence of the alleged grievance.
>
> The Company denies that it has violated the Master Agreement and denies the Association's request for a review of the amounts of increases granted, on the basis of the Company's sole obligation to determine the amount of a merit increase." Joint App. 37a)

On May 9, 1958, the Association, in compliance with Paragraph 8.04 of the Labor Agreement (Joint App. 145a-147a), referred the matter to the American Arbitration Association, and at the same time the Company was informed of the action taken by the Association. On May 22, 1958, the Association was notified by the American Arbitration Association that it had received a letter from an attorney for the Company, questioning the arbitrability of the matter. Accordingly, a letter was sent to the American Arbitration Association, signed by the attorneys for the defendant Association, briefly presenting the Association's reasons for believing the matter to be arbitrable.

The American Arbitration Association replied to both parties on June 10, 1958 that as a non-judicial administrative agency, it had no choice but to proceed with the matter. A list of arbitrators was submitted to both parties, and selection was made of Mr. Eli Rock, an experienced and well known labor arbitrator. Although the Company participated in the selection, it did so without waiving its right to contest arbitrability.

On July 10, 1958, the Company filed a Complaint in an attempt to prevent arbitration of the merit review issue, and thereafter the Association filed its answer, putting the

matter at issue. As a consequence of the filing of the Complaint, the Arbitration Association ceased its administration of the matter, pending the outcome in the District Court (Joint App. 20a-21a). Later, the Arbitration Association, at the insistence of the defendant, decided to proceed with the arbitration (Joint App. 22a-23a). Plaintiff then secured the temporary restraining order of the District Court, and pursuant to said Order, the Arbitration Association once again suspended the administration of this matter.

Thereafter, a hearing was held before the Court on an Order to Show Cause why a preliminary injunction, until final hearing, should not be issued and, on February 20, 1959, the District Court Judge issued an Order continuing the restraints theretofore imposed by the Court against the Defendants until final hearing of the cause (Joint App. 34a).

Final hearing of the matter was held before the District Court Judge on April 18, 1960 and April 19, 1960 at which time testimony was offered and various exhibits were received in evidence. Thereafter on August 4, 1960, the District Court Judge issued an opinion, finding for the Plaintiff, RCA, on its Complaint, and against the Defendants on their Counterclaim (Joint App. 150a-164a). Counsel for RCA was requested to file appropriate findings of fact and conclusions of law and thereafter on September 21, 1960, the Court filed its Findings of Fact and Conclusions of Law (Joint App. 165a-174a). The Order of Final Judgment was filed by the District Court on September 27, 1960 (Joint App. 175a-176a).

The Association then appealed the Order of the District Court to the U. S. Court of Appeals for the Third Circuit. Argument was held on April 6, 1961 and on May 25, 1961 the Court of Appeals unanimously reversed the judgment of the District Court and ordered that the cause be remanded for the entry of judgment denying relief on the Complaint and granting relief on the Counterclaim (App. pp. 1a-10a of the Petition).

ARGUMENT.

I. There Is No Conflict of Decision.

Petitioner's Brief, understandably, makes no reference to a conflict of decisions between Circuit Courts or between the instant decision and any decision of this Court, for the reason that none exists. It does attempt to create an illusion of conflicting views by utilizing the opinions of some textwriters together with short extracts from both the majority and concurring opinions of this Court in *United Steelworkers of America v. American Manufacturing Co.*, 363 U. S. 564 (1960) and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). By editorializing the short excerpts from those Opinions together with references to the commentaries of some of the textwriters, the Petitioner attempts to convey the impression that there may be some inconsistency in the decisions of the Courts which involve similar questions.

This is merely a smoke screen. Beginning with this Court's decision in *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957)—and even earlier by virtue of the decisions in the lower Courts—there has emerged a philosophy of enforcement of agreements to arbitrate labor disputes. This philosophy has coalesced into a firm policy by virtue of the *American Manufacturing Co.* and *Warrior & Gulf Navigation Co.* decisions by this Court.

What has been the result of the clarification of this policy by this Court?

This much is certain. When parties sit down to negotiate a labor agreement, including a provision for arbitration, they can now do so with assurance that they will have full opportunity to utilize the forum which they have chosen. There is now a degree of predictability which did not exist when the law was cluttered with decisions such as *International Association of Machinists v. Cutler-Hammer, Inc.*,

271 App. Div. 917, 67 N. Y. S. 2d 317, aff'd, 297 N. Y. 519, 74 N. E. 2d 464 (1947).[5]

The Petitioner, in its Brief, alludes to the impact of the decisions of the Court of Appeals of the Third Circuit (and necessarily, the decisions of this Court which formed the basis for the Third Circuit opinions) upon future collective bargaining. It is implied that employers may insist upon less inclusive arbitration provisions.

If this is so, then where has either labor or management been disadvantaged? The overriding consideration in the consummation of a labor agreement is predictability, and when matters are presented to the Courts, the parties are seeking prescribed standards upon which to base a future course of action. If the parties are fully aware of the coverage of a broad arbitration clause, they will not blindly agree to such provision.

Collective bargaining necessarily involves a give-and-take procedure in which the parties, by virtue of their relative economic strengths or weaknesses, arrive at an agreed-upon body of laws for industrial self-government. Having reached such agreement, the parties are entitled to rely upon it.

Where a labor organization is, by the nature of its relationship with management, agreeable to accepting less than a broad authorization for arbitration, no one should be heard to complain. But where, as in this case, the arbitration provision is broad, then the parties should not later be frustrated in their attempts to utilize it.

This is essentially what the Courts have said, and ultimate sanction was afforded to the rather consistent lower Court decisions by the decisions of this Court in *American Manufacturing Co.* and *Warrior & Gulf Navigation Co., supra.* There is not the slightest element of conflict between the Courts on the question presented in this case.

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5. This Court specifically rejected the doctrine enunciated in the *Cutler-Hammer* decision in its decision in *American Manufacturing Co., supra.*

II. There Is No Important Question of Federal Law Which Has Not Previously Been Answered by the Supreme Court.

Petitioner's Brief vigorously attempts to rehash the factual background of this matter in order to convince the Court now that there is something distinctive or novel about this case. But this is simply not so. It is true that the factual circumstances of different matters are rarely identical. The identity ordinarily arises, so far as this Court is concerned, in the legal issues which flow from the different factual situations.

Prior to *Lincoln Mills, supra*, it could truthfully be said that the issues which have arisen here involved novel and important questions of Federal law. In *Lincoln Mills* this Court took the first step toward answering some of the then existing doubts. There still remained the important question of the extent to which a broad arbitration clause in a contract should be applied. This Court disposed of that issue in the landmark *American Manufacturing Co.* and *Warrior & Gulf Navigation Co.* cases, *supra*, and these latter two decisions *disposed of the instant case.* This was clearly stated by the Circuit Court in the instant case and no matter how the Petitioner struggles to circumvent these precedents, it simply can not do so successfully.

The similarity of approach in the contractual language in the *American Manufacturing Co.* and *Warrior & Gulf Navigation Co.* cases and in the instant matter is both highly significant and readily apparent. This similarity exists both as to the scope of arbitration and as to that language which limits the arbitrator in his authority.

For example, in *American Manufacturing Co.*, the relevant arbitration provisions were spelled out in footnote 1 of that opinion, and the following portion of that footnote is set forth for purposes of comparison:

> "[1] The relevant arbitration provisions read as follows:

> 'Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. • • •
>
> 'The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement. Disputes relating to discharges or such matters as might involve a loss of pay for employees may carry an award of back pay in whole or in part as may be determined by the Board of Arbitration.
>
> 'The decision of the Board of Arbitration shall be final and conclusively binding upon both parties, and the parties agree to observe and abide by same. • • •' "

In *Warrior & Gulf Navigation Co.*, the following was said as to the relevant contractual provisions:

> "The collective agreement had both a 'no strike' and a 'no lockout' provision. It also had a grievance procedure which provided in relevant part as follows:
>
> 'Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.
>
> 'Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no

> suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:' "

And, in the instant matter, the following are the comparable contractual provisions:

(Included at p. 137a and p. 147a of the Appendix):

> "(c) *Grievance*
>
> 'Grievance' shall mean disputes or differences between the Company and the Association, or employees represented by it, with respect to the interpretation or application of any provision of this Agreement."
>
> • • •
>
> "The authority of the Arbitrator shall be limited to determining questions involving the interpretation or application of the terms of this Agreement or the applicable Area Agreement. He shall have no authority to add to, subtract from, or to change any of the terms of this Agreement or any Area Agreement, to change an existing wage rate, or to establish a new wage rate." (Par. 8.04)

Clearly the questions presented by the Petitioner are anything but novel. The arguments offered by the Petitioner, though they may be factually dissimilar, involve precisely the same legal issues which were disposed of previously by this Court. The purported concern by the Petitioner as to the effect of the approach taken by this Court and lower Courts upon future collective bargaining is little justification for this Court's reconsideration of issues already settled.

III. The Decision Below Is Clearly Correct.

A. The Argument as to Changing an Existing Wage Rate.

Throughout the life of this dispute, beginning with the initiation of the suit in the District Court and continuing in the Brief currently filed here, the Petitioner had made much of the provision in the labor agreement prohibiting the arbitrator from changing an existing wage rate or establishing a new wage rate. This, it is claimed, would prohibit an arbitrator from rendering a decision in favor of the Association.

The utter absurdity of this argument was clearly indicated by the decision in the Court of Appeals. The effect of the Petitioner's position would be that the Petitioner could, with impunity, tamper with, alter or eliminate any monetary benefit to which the members of the Association were entitled under the Labor Agreement, and then the Association would not be permitted to arbitrate the issue because, in the opinion of the Company, a ruling of the arbitrator to the effect that the Company had violated the Agreement by altering such monetary benefit would not be enforceable because the arbitrator's action to replace the benefit would be an alteration in the then current wage rate.

It is axiomatic that an arbitrator must have the authority to require that the Company refrain from violating its obligations where there is the type of arbitration provision as is present in this Agreement. It is no less axiomatic that this authority must include the right to require that the Company reinstate a wage rate which it had improperly altered, and this in no way can be construed to be an alteration of a wage rate, prohibited by the contract to the arbitrator.

B. The "Arbitration Versus Negotiations" Argument.

It has been suggested in Petitioner's Brief that the result of the decision of the Court of Appeals is that the Association has achieved through the Court that which it could not achieve through labor negotiations.

This is the stock argument which is always presented by a party attempting to avoid the obligation to arbitrate. Each time the parties sit down to negotiate a new labor agreement, there are a multitude of proposals made by both sides. In some cases they relate to new demands—in many others they are merely introduced to clarify the already existing contract. In these latter situations the party presenting the proposal takes the position that the demands which it is pressing are in the nature of clarification of already existing rights. Recognizing that because of ambiguous interpretations of language—or, in some cases, where there is no contractual language but merely an indication of an existing practice—the party making the demand does so in order to more firmly secure the advantage which it believes it has already obtained. In no way is this considered to be an admission that the right does not already exist. Furthermore, this is a practice engaged in by negotiators on both sides of the bargaining table.

The factual inferences which arise from an analysis of past bargaining are obviously important to a determination upon the merits of the controversy. They must be studied with particularity, and give rise to numerous questions, all of which the parties attempt to cover in the *arbitration forum.* This is the forum the parties here have chosen in their labor agreement; this is the forum the courts have found to be appropriate in similar situations; and this is the forum to which the parties have been directed by the Court of Appeals, in line with the prior decisions of this Court.

C. The Argument as to Judicial Inventiveness.

The petitioner has laid great stress upon the failure of the Court of Appeals to utilize "judicial inventiveness" in its deliberations, a phrase which it blithly extracts from the decision of this Court in *Textile Workers v. Lincoln Mills,* 353 U. S. 448, at 457 (1957). On closer scrutiny it is clear that what the petitioner really seeks is a Court that will use

judicial inventiveness to *invent* a method of circumventing the decisions of this Court in *American Manufacturing Co.* and *Warrior & Gulf Navigation Co., supra.*

The Court has rather clearly indicated that unless there is a showing that the parties specifically excluded a controversy from arbitration, when there is a broad arbitration clause in the contract and a claim, which on its face, relates to the interpretation of a provision of a contract, the Court will refrain from deciding the merits of the controversy.

Nonplussed, the Petitioner raises itself by the proverbial boot straps by first presenting its singular version of the factual background and the merits of the basic controversy, and then using the conclusions which it reaches to prove that the matter is procedurally not arbitrable.

Petitioner has clearly misinterpreted this Court's application of "judicial inventiveness" in an attempt to use this terminology as camouflage for its argument which runs directly opposite to the position which has been established by the decisions of this Court. In *Textile Workers v. Lincoln Mills, supra,* this Court explained that the judiciary must fashion a body of the Federal law for the purpose of enforcing labor agreements, and this was followed by the clear mandate in *American Manufacturing Co.* and *Warrior & Gulf Navigation Co., supra.* Petitioner would now have this Court extract from *Lincoln Mills* a blanket of judicial inventiveness with which to smother its later decisions in the *American Manufacturing* and *Warrior & Gulf* cases.

In the world of literature, much use has been made by present-day dramatists of the concept of "the moment of truth". This expression is well applied to the argument which has been offered on behalf of the Petitioner. Superficially read, the argument seems to derive its support from decisions of this Court. But the external appearance is deceiving, and upon closer look, the real truth emerges. In effect, *the Petitioner is asking this Court to reverse its decisions in American Manufacturing and Warrior & Gulf.*

This is the sum and substance of Petitioner's argument. It has chosen itself as the emissary on behalf of all those—

either labor or management—who would refuse to comply with the obligation to arbitrate whenever it might be inconvenient to do so, and is presenting this Petition in the hope that this Court may completely reverse its prior stand on these issues. The inherent danger in this request is manifest. A return to a status where parties can unilaterally refuse to comply with their bargain to arbitrate disputes can only result in chaos.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

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